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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 295

MILK DRIVERS AND DAIRY EMPLOYEES LOCAL UNION No. 584, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioners,

—against—

OLD DUTCH FARMS, INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Statement

Respondent opposes granting the petition for a writ of certiorari on the ground that the decision of the United States Court of Appeals for the Second Circuit is not in conflict with the applicable decisions of this Court or any other Court of Appeals and is in accord with the intention of Congress when Section 303 of the Labor Management Relations Act of 1947 was adopted.

Question Presented

The petition to this Court erroneously raises a question under Section 301 of the Labor Management Relations

Act of 1947, as amended which is not in issue here or raised by respondent's complaint.

The respondent's action is not brought under any contract nor by reason of any prior contractual relation between the parties.

It is a statutory action brought under Section 303 of the Labor Management Relations Act of 1947 as amended.

The Congress of the United States created a separate tort liability which is not dependent upon privity of contract nor any contractual relationship. It is bottomed solely upon the factual question under the statute, viz: did the petitioner engage in any activity or conduct defined as an unfair labor practice in Section 8(b)(4) of the National Labor Relations Act as amended and was the respondent injured in his business or property by reason of such activity or conduct.

Statement of the Case

This is an action brought under Section 303(b) of the Labor Management Relations Act as amended, by respondent against petitioner, a labor union, for damages sustained by respondent because of a violation by the union of Section 303(a) of said Act.

The complaint in the first cause of action alleges the specific activity or conduct which constituted the unfair labor practices under Section 8(b)(4) of the National Labor Relations Act (app. 4a-8a) and in the second cause of action alleges that the National Labor Relations Board found such conduct to be unfair labor practices under Section 8(b)(4) which findings were affirmed by the Court of Appeals, Second Circuit (app. 8a-11a).

In December, 1962 a controversy arose between petitioner and respondent as to whether Section 66(a) of the then Collective Bargaining Agreement had been violated by respondent. An arbitrator was appointed pursuant to the provisions of the contract and several hearings were held between March, 1963 and May 22, 1963, at which time the hearing was adjourned to June 4, 1963. However, on May 27, 1963 petitioner, in disregard of the then pending arbitration, proceeded to strike respondent's supplier, Balsam Farms, Inc. The union's purpose as found by the National Labor Relations Board (146 NLRB No. 62) and sustained by the United States Court of Appeals, Second Circuit (341 Fed. 2d 29), was to induce and encourage individuals employed by Balsam Farms, Inc. to cease doing business with respondent and by threatening, coercing and restraining Balsam Farms, Inc. with an object of forcing and requiring Balsam Farms, Inc. to cease doing business with respondent in violation of Section 8(b)(4)(i)(ii)(B) of the National Labor Relations Act.

On May 28, 1963, the day after the strike against the Balsam Farms, Inc., respondent filed a charge with the Regional Director for the Second Region. A hearing was held on August 13, 1963 before a trial examiner designated by the National Labor Relations Board. His decision finding the petitioner union guilty of unfair labor practices in violation of section 8(b)(4)(i)(ii)(B) was handed down on October 9, 1963.

While these proceedings were pending, the arbitrator, appointed in the controversy between respondent and petitioner, set August 27, 1963 as the date for the next hearing in that matter. When the union failed to appear, respondent filed a petition in the Supreme Court, Queens County, State of New York, for an order directing the union to proceed with the arbitration and for a stay of

any other arbitration proceeding before any other arbitrator on the same issue as between the union and any other signatory to the Collective Bargaining Agreement. The union, however, in the meantime attempted to institute such an arbitration proceeding before Theodore W. Kheel as arbitrator.

The union resisted respondent's proceeding. It had the proceeding removed to the District Court of the United States for the Eastern District of New York and argued before Chief Judge Zavatt for the dismissal of the petition and the vacation of the temporary stay contained in the order to show cause.

On October 3, 1963, Chief Judge Zavatt rendered a decision finding that the union breached the arbitration clause of the Collective Bargaining Agreement and ordered it to forthwith resume the arbitration and enjoined the union from participating in any other arbitration proceeding involving the same issues until the then pending proceeding was completed. The detailed opinion of Chief Judge Zavatt is reported at 222 F. Supp. 125 (*Old Dutch Farms, Inc. et ano* v. *Milk Drivers & Dairy Employees Union Local 584*).

On October 8, 1963, the union noticed an appeal from Chief Judge Zavatt's order and moved in the United States Court of Appeals, Second Circuit, for an order staying the District Court order pending determination of its appeal. The Court granted the stay on condition that the respondent would not be deemed a party to any other arbitration proceeding or be bound by any award.

The union's appeal was never argued in the Court of Appeals and since respondent was not a signatory to the new Collective Bargaining Agreement effective October 24, 1963 and since in any event it was stipulated that

respondent would not be bound by the subsequent award, the union's appeal was withdrawn and the action discontinued. At no time since that date did the union seek to continue the arbitration proceeding with respondent.

While the foregoing legal maneuvers were proceeding, the National Labor Relations Board adopted the decision and recommended order of the trial examiner (146 NLRB No. 62) and petitioned the Court of Appeals for enforcement of its order. On January 26, 1965, the Court unanimously granted the petition for enforcement (*National Labor Relations Board* v. *Milk Drivers & Dairy Employees Local Union No. 584*, 341 Fed. 2d 29). This Court denied certiorari (382 U. S. 816).

Thereafter, respondent commenced this action pursuant to Section 303(b) of the Labor Management Relations Act for damages sustained by it by reason of the petitioner's activity or conduct defined as an unfair labor practice in Section 8(b)(4) of the National Labor Relations Act.

Petitioner's motion in the District Court to stay respondent's action was granted (243 F. Supp. 246). However, on appeal to the Court of Appeals for the Second Circuit, the order of the District Court, was unanimously reversed (359 Fed. 2d 598).

Petitioner has now applied to this Court for a writ of certiorari.

Reasons for Denying the Writ

It is respectfully submitted that the petition for a writ of certiorari should be denied for the following reasons:

(1) The decision of the Court of Appeals that a new substantive right was created by Congress in the

enactment of Section 303 of the Labor Management Relations Act is in accord with applicable decisions of this Court and decisions of Courts in other circuits and districts.

(2) The cases cited in the petition are not applicable or relevant authorities since none of those cases arose under or were brought pursuant to Section 303 of the Labor Management Relations Act.

POINT I

The decision of the Court of Appeals that a new substantive right was created by Congress in the enactment of Section 303 of the Labor Management Relations Act is in accord with applicable decisions of this Court and decisions of Courts in other Circuits and Districts.

The history of Section 303 of the Labor Management Relations Act is well documented in the Congressional Record. Moreover, the intention of Congress to create a statutory tort liability, a substantive right for a private suit for damages in a Court was clearly expressed.

In *United Construction Workers* v. *Laburnum Construction Corp.* (347 U. S. 656), this Court recognized that Congressional intention. At page 665 the Court said:

> "One instance in which the Act prescribes judicial procedure for the recovery of damages caused by unfair labor practices is that with reference to the jurisdiction of federal and other courts to adjudicate claims for damages resulting from secondary boycotts. In that instance the Act expressly authorizes a recovery of damages in any Federal District Court and 'in any other court having jurisdiction of the parties.' By

this provision, the Act assures uniformity, otherwise lacking, in rights of recovery in the state courts and grants jurisdiction to the federal courts without respect to the amount in controversy."

Continuing the examination of Congressional intent the Court said at page 666-667:

"The fact that it prescribed new preventive procedure against unfair labor practices on the part of labor organizations was an additional recognition of congressional approval of such practices. Such an express recognition is consistent with an increased insistence upon the liability of such organizations for tortious conduct and inconsistent with their immunization from liability for damages caused by their tortious practices."

In a later decision, *Local 20 Teamsters Union* v. *Morton*, 377 U. S. 252, 258, this Court, construing the section, said:

"Section 303(b) of the Labor Management Relations Act expressly authorizes state and federal courts to award damages to any person injured by certain secondary boycott activities described in Section 303(a). The type of conduct to be made the subject of a private damage action was considered by Congress, and Section 303(a) comprehensively and with great particularity 'describes and condemns specific union conduct directed to specific objectives.' Carpenters Local 1976 v. Labor Board, 357 U. S. 93, 98."

The decision of the Court of Appeals is in accord with these pronouncements.

Section 303 was among the amendments submitted in May, 1947 to the proposed bill reported out of the labor committee.

As the amendment was originally proposed by Senator Taft with a further amendment by Senator Ball, the first part of the section spelled out in detail the ban on secondary boycotts and jurisdictional strikes. It repeated the language of section 8(b)(4). The subsequent sub-divisions of the proposed amendment then gave an employer who was injured thereby, the right to direct application to the Court for injunctive relief and monetary damages. There was considerable debate in the Senate concerning this proposal covering a great many pages of the Congressional Record.

Senator Ives was among those who spoke in opposition to the Ball amendment which proposed to give an employer the right to seek direct injunctive relief. After explaining the reason for his opposition to the direct injunctive relief provisions, he continued:

> "As I understand, a substitute amendment will be offered to authorize the bringing of actions for damages in the Federal Courts, under certain conditions as I have indicated. I know of no reason in the world why actions for damages should not be permitted in the Federal Court. That is perfectly legitimate. I know of no reason in the world why one suffering from such abuses or violations should not have the right to recover damages, not only in the Federal Court, but in any Court.
>
> * * * * *
>
> * * * Once it is established that recovery may be had for damages in the Federal Courts, it will go a long way toward stopping the jurisdictional dispute and secondary boycott."
>
> (93 Cong. Rec. 4839, 2 Leg. Hist. Labor Management Relations Act 1947, 1357.)

The intention to create a new substantive right different from that under Section 301 is likewise found in the opposing remarks of Senator Morse when he pointed out that the substitute proposal (the right to sue for damages) was inconsistent with the provisions of Section 301 allowing a union to be sued for breach of contract. (93 Cong. Rec. 4839, 4840; 2 Leg. Hist. Labor Management Relations Act 1947, 1358-1359.) After a colloquy with Senator Taft, he continued:

> "Section (c) of the proposed amendment is, in my judgment, also unwise. This allows suits for damages to be brought in the Federal Courts for violations of the section to recover damages and costs of the suit."
>
> (93 Cong. Rec. 4841; 2 Leg. Hist. Labor Management Relations Act 1947, 1361.)

The foregoing expressions of opinion were made during the debate on the Ball amendment permitting employers the right to sue for injunctive relief.

Senator Taft, sensing opposition to the direct injunctive relief provisions, even among those favorable to the principle of private damage suits, indicated that he would vote against the Ball amendment so that the direct injunctive relief provisions would be withdrawn. He said:

> "I found that opposition to restoring the injunctive process even in cases of secondary boycotts and jurisdictional strikes seemed to be so strong, and I am so anxious to retain provisions covering the right of direct action in suits brought for damages in cases of that kind that I have determined that I shall vote against the Ball amendment and then offer the substitute, which provides for direct suits in cases of secondary boycott" (93 Cong. Rec. 4843). • • •

"It seems to me that the right to sue for damages is a very vital thing to retain. As I sense, the sentiment of the Senate, I believe it is in favor of that, although not for the injunctive procedure."

(93 Con. Rec. 4844, 2 Leg. Hist. Labor Management Relations Act 1947, 1365.)

Later that day, the Senate resumed deliberation of the Taft amendment. The clerk read the section and then Senator Taft explained:

"It retains simply the right of suit for damages against any labor organization which undertakes a secondary boycott or a jurisdictional strike. I think it is a most effective remedy. * * * After all, it is only to restore to people who lose something because of boycotts and jurisdictional strikes the money which they have lost. I do not think suits will often be brought because I believe the proposal of a suit will be a deterrent to prevent unions undertaking this kind of racketeering activity."

(93 Cong. Rec. 4858; 2 Leg. Hist. Labor Management Relations Act 1947, 1371.)

In the ensuing debate on the amendment, the following colloquy occurred:

"Mr. Ferguson: As I read the section, all that is attempted to be done by the amendment is to provide jurisdiction in the Federal Courts in suits for damages, in case damages might be proved by reason of certain conduct.

Mr. Taft: That is correct.

Mr. Ferguson: Therefore, all the amendment would do, if adopted, would be to create a cause of action

for damages which could be heard before a jury in a Federal Court.

Mr. Taft: That is correct."

(93 Cong. Rec. 4859; 2 Leg. Hist. Labor Management Relations Act 1947, 1372.)

In response to further questions, Senator Ferguson stated, "That amendment merely creates a right of action for a trespass or for damages." Because fears were expressed by some Senators that criminal penalties might be invoked because of the use of the word "unlawful," Senator Taft said, "If it makes any difference to anyone, we will handle the matter by inserting, after the word 'unlawful' the words 'for the purposes of this section' and then the only thing under this section is the suit for damages" (93 Cong. Rec. 4859; 2 Leg. Hist. Labor Management Relations Act 1947, 1373).

As the debate continued, the intention of Congress to confer a new substantive right, creating a statutory tort liability against a violating labor union separate from the rights and liabilities under Section 301 and vesting jurisdiction solely in a Court or a Court and jury became clearer and more self-evident.

Senator Pepper, voicing his opposition to the amendment, indicated that his understanding of the proposal was that it created a new damage action, separate and apart from that provided under Section 301, outside of any cause of action for breach of collective bargaining contracts and not limited or bound by arbitration agreements. He said:

"Senators will recall that the bill itself provides that there may be suits by or against labor unions in the

Federal Courts for breach of collective bargaining agreements. The bill also provides that boycotts as defined in the bill and jurisdictional strikes are unfair labor practices, and it makes it obligatory in case of a complaint being made that an unfair labor practice of this character has been committed, that the regional attorney or regional representative of the National Labor Relations Board shall apply to the Courts for a temporary restraining order.

In addition to that, the Senator from Ohio proposes to make the basis of a substantive suit at law for damages what the bill in its principal capacity describes as an unfair labor practice. Whereas, the bill seems to me to provide merely a procedural remedy in a Federal Court, the Taft amendment proposes to confer a substantive right for a suit for damages in a Federal Court, because it says 'whoever shall be injured in his business or property by reason of any violation of sub-section (a) may sue therefor in any District Court of the United States subject to the limitations and provisions of Section 301 hereof.' * * * It tends to foment litigation and to get away from the adjustment of these disputes by procedures before the National Labor Relations Board or by arbitration agreements, or by machinery set up in the collective bargaining contracts."

(93 Cong. Rec. 4868, 2 Leg. Hist. Labor Management Relations Act 1947, 1390.)

Neither Senator Taft nor any of the proponents of the amendment indicated disagreement with Senator Pepper's presentation of the aims and purposes of the amendment.

The record affirmatively indicates agreement, when Senator Taft in response to a question by Senator Morse said

"the purpose is to enable the bringing of Civil suits for damages." He also said: "Under the Sherman Act, the same question of boycott damage is subject to a suit for damages and attorneys' fees. In this case, we simply provide for the amount of the actual damages" (93 Cong. Rec. 4872-4873; 2 Leg. Hist. Labor Management Relations Act 1947, 1396).

The senate thereafter approved the amendment by a vote of 65 to 26 (93 Cong. Rec. 4874; 2 Leg. Hist. Labor Management Relations Act 1947, 1400).

On July 27, 1959 in the discussions in the House of Representatives, when the Labor Management Relations Act of 1959 came up for debate, Congressman Griffin, one of the co-authors of the Landrum-Griffin Bill, which subsequently became the Labor Management and Reporting and Disclosure Act of 1959, referring to the 1947 Section 303 and his proposed amendment indicated that no change was contemplated in the intention of Congress. He said:

> "The purpose is to make the language of Section 303 conform to the amendments to Section 8(b) provided for in the earlier parts of this section. Section 303, under present law, authorizes damage suits for boycotts."
>
> (105 Cong. Rec. Part II, 14348; 2 Leg. Hist. Labor Management and Reporting and Disclosure Act of 1959, 1523.)

The intention of Congress to create a separate tort liability is clearly indicated by the foregoing extracts from the Congressional Record.

Moreover, there is no divergence between circuits.

In *Twin Excavating Co.* v. *Local Union No. 731, et al.* (337 Fed. 2d 347, CCA 7th Cir.), an action was instituted

by the plaintiff to recover damages by reason of the activities of the defendant in forcing prime contractors and subcontractors to cease doing business with plaintiff and in forcing employees of subcontractors to cease performing services for plaintiff. These activities plaintiff claimed was a violation of Section 8(b)(4) of the National Labor Relations Act and sued for damages under Section 303 of the Act. The defendant union moved to stay the proceeding on the ground that there was an arbitration provision in a collective bargaining agreement between plaintiff and the defendant, union. The Circuit Court, after stating the foregoing facts and quoting the arbitration provision, posed the question involved, in language, pertinent to the instant appeal. The Court said (p. 438):

> "The basic issue in this suit is whether the Labor Management Relations Act, 1947, 29 U.S.C. 141 et seq. sometimes hereinafter referred to as the "Act" contemplated an arbitration proceeding as a substitute for a court hearing in a suit for damages under section 303 of the Act, where plaintiff and defendant are parties to a collective bargaining contract."

After stating the law when a suit is brought under Section 301 for a violation of a contract, which contains a provision for arbitration, the Court continued as follows (p. 438):

> "However, the instant suit is not an action brought under section 301 of the Act. It is a suit for damages under section 303 of the Act, and does not involve a suit for violation of a collective bargaining agreement. At the time the bill creating the Labor Management Relations Act, 1947, was before Congress, that body was greatly concerned with what it regarded as serious evils growing out of secondary boycotts and juris-

dictional strikes. In section 8 (b)(4) of the Act, Congress defined such conduct by Labor organizations as unfair labor practices. Section 303 defines such conduct as being unlawful, and grants to a party injured by such conduct of a labor organization, the right to sue. International Longshoremen's & Warehousemen's Union, et al. v. Juneau Spruce Corporation, 342 U. S. 237, 72 S. Ct. 235, 96 L. Ed. 275.

The intent of Congress in enacting section 303 is well shown by a statement of Senator Taft, who was the author of the bill. The Senator said: '* * * I think the threat of a suit for damages is a tremendous deterent to the institution of secondary boycotts and jurisdictional strkies.' * * * (93 Cong. Rec. 5060; 11 Leg. Hist. of Labor Management Relations Act of 1947, page 1371)."

The Circuit Court concluded its opinion with this statement:

"We hold the District Court was correct in denying defendant-appellant's motion to stay proceedings and to refer same to the Joint Committee or Joint Board."

United States Steel Corp. v. *Seafarers International Union,* 237 F. Supp. 529 (E. D. Pa. 1965) was an action containing a complaint with two counts. One count alleged a violation of Section 301(a) asserting a breach of contract; the other, a violation of Section 303 for damages because the defendant engaged in activities proscribed by Section 8(b)(4).

On defendant's motion to stay the action, the Court stayed the 301 (a) cause of action, but permitted the 303 cause of action to proceed in the Court.

In the case at bar, neither count in the complaint alleges a claim under Section 301. Both causes of action are based on Section 303.

The moving affidavit (app. 14a-24a) does not change the gravamen of respondent's cause of action. The moving papers do not and cannot convert what this Court has described as "tortious practices" * into a breach of contract or an arbitrable dispute under a collective bargaining agreement.

The cases cited in petitioner's brief all involve actions under Section 301. Consequently they fail to apply and petitioner is in error in equating such suits with the cause at bar.

POINT II

The cases cited in the petition are not applicable or relevant authorities, since none of those cases arose under or were brought pursuant to Section 303 of the Labor Management Relations Act.

Petitioner's request for a writ of certiorari is based upon its argument that the Court of Appeals' decision is contrary to this Court's decision in *Drake Bakeries, Inc.* v. *Local 50* (370 U. S. 254).

To support this argument, it asserts at page 16 of its brief that "the complaint alleges a violation of the no-strike clause and therefore states a claim based on alleged violation of specific terms of the agreement."

Both the argument and the assertion are erroneous.

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* *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U. S. 656, 667.

Neither cause of action in the complaint alleges a breach of contract. Nor are damages sought for a breach of contract. The Court of Appeals recognized that distinction when it said "it is in no way based on an alleged breach of contract and neither invokes or needs to invoke the contract. The employer asserts that it 'was injured in its business and property' and seeks damages solely for the injuries caused by the union's allegedly unlawful activity" (359 Fed. 2d 598, 601; Appendix A, 3a-4a).

Drake Bakeries, Inc. v. *Local 50* was brought specifically under Section 301 of the Labor Management Relations Act as amended, and the complaint in that case alleged a contractual relationship and a breach of that contractual relationship by the union. This Court passed solely on that complaint. It alleged a strike by the union in violation of the no-strike clause contained in that contract, with no suggestion in the record of an unfair labor practice (370 U. S. 254, 265). Under such a complaint the contract perforce had to be examined and this Court determined that the arbitration clauses contained in the instrument precluded Drake from any other remedy.

Neither *Drake Bakeries* v. *Local 50* nor the other cases cited in petitioner's brief are relevant authorities because none of the cases involved an action under Section 303(b). Moreover, in none of the cases was there a secondary boycott, or a violation of Section 8(b)(4) or was there an order of the Board and a decree of a Court finding that a violation of Section 8(b)(4) had occurred.

There is no suggestion in the present complaint expressed or implied that respondent's damage occurred because of a breach of contract or a violation of a no-strike clause.

The tortious acts of petitioner which Congress declared unlawful caused respondent's damage, not a breach of contract or a violation of a no-strike clause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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